Editor's note: 88 I.D. 918; appealed - dismissed with prejudice (settled), Civ.No. 84-0315 (D.Wyo. June 6, 1986)

CONOCO, INC.

IBLA 81-846 Decided October 21, 1981

Appeal from the decision of the Wyoming State Office, Bureau of Land Management, declaring an unpatented oil placer mining claim abandoned and void. W MC 142785.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mir Work--Mining Claims: Placer Claims--Mining Claims: Recordation

> Oil placer mining claims located pursuant to the Petroleum and Mineral Oils Act of Feb. 11, 1897, c. 216, 29 Stat. 526, and preserved by sec. 37 of the Mineral Leasing Act of 1920, 30 U.S.C. § 193 (Supp. II 1978), are subject to the recordation requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

2. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notic Recordation

> Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining

claim located on or before Oct. 21, 1976, must file a notice of intention to hold or evidence of performance of annual assessment work on the claim on or before Oct. 22, 1979, and prior to Dec. 31 of each year thereafter. This requirement is mandatory and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and renders the claim void.

3. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mir

   The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself. A matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences.

4. Administrative Authority: Generally--Constitutional Law: Generally--Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Recordation

   Department of the Interior, as an agency of the executive branch of Government, is without jurisdiction to consider whether the mining claims recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.

APPEARANCES: Clyde O. Martz, Esq., Stephen D. Alfers, Esq., and Janice K. Borgerson, Esq., Denver, Colorado, for appellant; Marla E. Mansfield, Esq., Office of Regional Solicitor, Denver, Colorado, for BLM.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Conoco, Inc., has appealed the decision of the Wyoming State Office, Bureau of Land Management (BLM), dated June 12, 1981, declaring the Black Bird #3 mining claim, W MC 142785, abandoned and void for failure to file evidence of assessment work or a notice of intention to hold the claim during calendar year 1980 on or before December 30, as required by by 43 CFR 3833.2-1(a).

The Black Bird #3 claim is an unpatented oil placer mining claim which was located on August 31, 1915, in the NE 1/4 SE 1/4 sec. 3, T. 33 N., R. 76 W., sixth principal meridian, Converse County, Wyoming, pursuant to the Petroleum and Mineral Oils Act of February 11, 1897, c. 216, 29 Stat. 526. On October 4, 1979, appellant timely filed the notice of location for the claim and evidence of assessment work for the 1978 assessment year in order to comply with section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976). On October 18, 1979, appellant filed evidence of assessment work for the 1979 assessment year. BLM did not receive any filings from appellant in 1980.

In its statement of reasons, appellant argues that the Black Bird #3 claim is not subject to the recordation requirement of section 314 of FLPMA because it was a valid oil placer mining claim on the date of passage of the Mineral Leasing Act of 1920, 41 Stat. 437 (Feb. 25, 1920) (codified, as amended, at 30 U.S.C. §§ 181-287 (1976

and Supp. II 1978)), and is governed, therefore, by section 37 of that Act, 30 U.S.C. § 193 (Supp. II 1978). 1/ The Mineral Leasing Act of 1920 removed various mineral substances, including oil, from mining location under the mining laws and permitted disposal of them only under lease from the United States. Section 37 preserved valid existing claims which would thereafter be maintained in compliance with the laws under which they were initiated and which could be perfected under such laws, including discovery. 2/

1/ We note that, on October 4, 1979, Conoco submitted to BLM a certified copy of the notice of location for the Black Bird #3 placer mining claim, as well as the ancillary information required by 43 CFR 3833.1-2, including an affidavit of assessment work for the assessment year ending September 1, 1978. The letter of transmittal stated: "We wish to comply with Section 314 of the Federal Land Policy and Management Act of 1976, requiring the recordation of unpatented mining claims located on public land with the Bureau of Land Management, and . . . 43 CFR 3833." An affidavit of assessment work for the assessment year ending September 1, 1979, was filed with BLM October 18, 1979. Subsequently, in a letter dated June 5, 1981, Conoco admitted that the 1980 affidavit of assessment work was not filed because of inadvertence. These actions by Conoco tend to undermine its protestations on appeal.

2/ The current version of section 37 reads:

"§ 193. Disposition of deposits of coal, and so forth

"The deposits of coal, phosphate, sodium, potassium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits in Lander, Wyoming, coal entries numbered 18 to 49, inclusive, shall be subject to disposition only in the form and manner provided in this chapter, except as provided in section 1716 and 1719 of title 43, and except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

The most recent amendment to section 37 is the phrase "except as provided in section 1716 and 1719 of title 43," which refers to sections 206 and 209 of FLPMA. Section 4, P.L. 95-554, 92 Stat. 2074 (1978). The amendment was passed after discovery that section 37 would appear to preclude disposition of lands containing the minerals identified in section 37 under sections 206 and 209 of FLPMA to exchange and convey lands containing the minerals listed in section 37 which minerals by its terms are only subject to disposition under the Mineral Leasing Act. Appellant suggests that this amendment to section 37 is further indication that Congress did not intend that section 314 of FLPMA apply to claims preserved by section 37. Appellant argues that if Congress had intended that the requirements of section 314 of FLPMA apply to claims

Appellant argues that section 37 provides that valid claims existing on February 25, 1920, are subject to compliance only with the laws under which they were initiated, as those laws were administratively and judicially interpreted in 1920, because section 37 in effect repealed those laws. More specifically, appellant asserts that post-1920 standards and requirements governing mining claims cannot be imposed on its claims. Appellant urges that this view has been given judicial approbation by the Supreme Court in Andrus v. Shell Oil Co., 446 U.S. 657 (1980). Appellant concludes that, since section 314 of FLPMA did not exist in 1920 and FLPMA did not purport to repeal section 37 of the Mineral Leasing Act, its claim is not subject to the requirements of FLPMA.

In addition appellant urges that section 314 of FLPMA violates the due process clause of the Fifth Amendment of the United States Constitution because (1) it deprives appellant of an interest in property by erecting a conclusive presumption of abandonment of its claim, and (2) it denies appellant equal protection of the laws.

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fn. 2 (continued)
such as its oil placer, Congress would have expressly done so when it was resolving the conflict between sections 206 and 209 of FLPMA and section 37. This argument does not withstand scrutiny. The concern in amending section 37 focused solely on the language mandating that the listed substances be disposed of only under the Mineral Leasing Act, which language directly conflicted with the authority Congress had intended to impart to the Secretary of the Interior in sections 206 and 209 of FLPMA. H.R. Rep. No. 95-1635, 95th Cong., 2d Sess. 14, reprinted in [1978] U.S. Code Cong. & Ad. News 4737, 4747-48. We conclude that it is purely speculative to connect this amendment with Congress intention with respect to the relationship of section 37 and section 314 of FLPMA. Clearly, it is more reasonable to suggest that Congress did not see any conflict between section 37 and section 314 and thus did not need to clarify the relationship.

In response to appellant's statement of reasons, BLM argues generally that the recordation requirements of FLPMA apply to all unpatented mining claims on public lands and specifically that the unpatented Black Bird #3 oil placer claim is subject to the General Mining Law of 1872, as amended, 30 U.S.C. §§ 21-54 (1976) (hereinafter General Mining Law), by virtue of the language of the Petroleum and Mineral Oils Act. BLM urges that section 37 of the Mineral Leasing Act did not exempt mining claims located for Mineral Leasing Act minerals from the operation of the General Mining Law, rather, it preserved such claims so long as they were maintained in accordance with the General Mining Law. Further, BLM asserts that the General Mining Law is not static and that changes may be applied to any unpatented mining claim until all steps precedent to patent have been taken, and that Andrus v. Shell, supra, does not stand for the proposition that appellant asserts. Finally, BLM urges that the application of the recordation requirements of FLPMA to mining claims located for Mineral Leasing Act minerals is consistent with the purpose of the requirement to identify existing mining claims on public lands and to clear the books of any claims no longer being maintained as required by law.

The issue in this case is whether the requirements of section 314 of FLPMA apply to appellant's unpatented oil placer claim. We find that they do.

[1] The recordation requirements of section 314 of FLPMA are imposed on the owner of any "unpatented lode or placer mining claim."

The statute does not define or limit the term "mining claim." Departmental regulations implementing section 314, however, define "unpatented mining claim" to mean "a lode mining claim or a placer mining claim located under the General Mining Law of 1872, as amended (30 U.S.C. 21-54) for which a patent under 30 U.S.C. 29 and [43] CFR Part 3860 has not been issued." 43 CFR 3833.0-5(b).

Appellant seemingly argues that because the Black Bird #3 claim was located pursuant to the Petroleum and Mineral Oil Act of 1897 it was not "located under the General Mining Law of 1872." Further, appellant asserts that if Congress had wanted the claims protected by section 37 to be maintained under the General Mining Law, it would have so specified.

The Petroleum and Mineral Oils Act encompassed a broader body of law than mere reference to the statute suggests. The Act stated:

> That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: [emphasis added] Provided, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this Act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof.

Thus Congress authorized the location of mining claims for oil under the provisions of the general laws relating to placer mining claims. The laws referred to were, at that time, Revised Statutes, sections

2329-2333, and are now codified at 30 U.S.C. §§ 35-38 (1976). These provisions are part of the General Mining Law. Chrisman v. Miller, 197 U.S. 313, 320 (1905). The Petroleum and Mineral Oils Act, when enacted, was simply an affirmation of the principle that lands containing petroleum and other mineral oils were subject to mining location under the mining laws of the United States. Union Oil Co. (On Review), 25 L.D. 351 (1897).

Thus, appellant's oil shale placer mining claim falls

3/ The cited decision reviewed the case of Union Oil Co., 23 L.D. 222 (1896), wherein Union's oil mining claim was situated on land selected as indemnity by a railroad, and the Department found that only lands containing metallic minerals were within the contemplation of Congress in the enactment of the mining statutes and in making an exception of all mineral lands from a grant to a railroad company. The decision in Union Oil Co. (On Review), supra at 355-56, which was issued Nov. 6, 1897, following passage of the Petroleum and Mineral Oils Act discussed the meaning of its passage as follows:

"Sufficient has been said to show that ever since the circular of July 15, 1873, until the date of the decision under review, the practice of the Land Department has uniformly been to allow entries under the mining laws of lands containing valuable deposits of petroleum, and that this view has obtained to such an extent that many titles to lands patented as mineral because of the valuable oil deposits contained therein, are now dependent upon it. * * *

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"It is proper, in this connection, to refer to the act of February 11, 1897, supra, passed soon after the decision under review was rendered. * * *

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"The language of the act clearly indicates, and the debates of Congress, as well as the report of the Public Lands Committee of the House on the bill, unmistakably show, that it was passed for the purpose of restoring the practice which had prevailed in the Land Department prior to the decision under review. In the House Committee's report reference was made to that decision in connection with some of the earlier rulings on the subject, as hereinbefore set out, and inter alia, it was said:

'Public lands containing petroleum and other mineral oils have been held and patented under the placer mining acts of the United States for many years past . . . . The bill simply provides by legislation for procedure in the entry and patenting of those lands along the lines that have been pursued in the past under the decisions of the General Land Office; so that there is no departure whatever from the procedure in the past for the development and acquirement of such properties.'

within the ambit of 43 CFR 3833.0-5(b). Further, in the case of the Black Bird #3 claim we conclude that the phrase "laws under which [the claim was] initiated" in section 37 must include the General Mining Law. We also find that section 37 must be read to include judicial interpretation of the applicable mining statutes because of the reference in section 37 to "discovery," which is a principle of mining law not defined by a particular statute but by judicial declaration. Chrisman v. Miller, supra at 321.

Further examination of section 37 of the Mineral Leasing Act and the Petroleum and Mineral Oils Act, supra, leads us to conclude as well that appellant's assertion that section 37 mandates that the law governing appellant's oil placer claim remain fixed as of February 25, 1920, is incorrect. We do not find that Congress intended to so limit its power to regulate such unpatented mining claims; rather, by section 37 Congress preserved a claimant's opportunity to bring an existing claim to patent under the General Mining Law even though the Mineral Leasing Act removed the mineral from operation of the General Mining Law.

As we have observed, the Petroleum and Mineral Oils Act only reasserted authority for the location of placer mining claims for petroleum and other mineral oils under the General Mining Law governing all placer mining claims. The Act did not specify any requirements peculiar

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fn. 3 (continued)

"This legislative action, so promptly taken after the departure from the earlier rulings and the long established practice thereunder, is significant, and can hardly be considered as less than a disapproval by Congress of the changed ruling."

to placer claims located under the Act. 4/ Congress did not by section 37 repeal the General Mining Law, as to existing mining claims for Mineral Leasing Act minerals, and we find no basis for asserting that Congress intended that unpatented oil placer claims located under the Petroleum and Mineral Oils Act would not be subject to changes in the mining laws governing unpatented placer claims. While Congress did single out claims such as the Black Bird #3 oil placer claim in order to preserve valid existing rights to such claims, it did not intend that such claims would receive special treatment as against other placer mining claims; and the Petroleum and Mineral Oils Act provides no basis for distinguishing appellant's claims. Furthermore, the purpose of section 314 of FLPMA is to provide a record of continuing activity on unpatented mining claims on public domain lands so that the Federal Government will know which claims are being maintained and which have been abandoned. See Topaz Beryllium Co. v. United States, 479 F. Supp. 309, 311-12 (D. Utah 1979), aff'd, 649 F.2d 775 (10th Cir. 1981). Arguably, these requirements are particularly apropos to claims as old as the one at issue herein.

We do not agree that the Supreme Court's opinion in Andrus v. Shell Oil Co., supra, supports appellant's argument. In that case, the

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4/ Where the statute, under which a claim protected by section 37 was initiated, does contain specific requirements, those requirements are applicable and would control as to other conflicting requirements imposed on the mining claims. For example, in John B. Forrester, 48 L.D. 188 (1921), cited by appellant, the Department held that the question of whether the appellant had a preexisting coal entry under section 37 did not have to be reached because appellant had not maintained the entry pursuant to the law under which it was initiated. Appellant had not complied with a regulation implementing the notice requirement imposed by the law governing coal entries.

Court affirmed for pre-1920 oil shale mining claims an exception to the general principles for determining whether there has been a discovery of a valuable mineral deposit under the mining laws. Frederick H. Larson v. Utah, 50 IBLA 382 (1980). The Court ruled that the Department of the Interior could not impose the present marketability test, approved by the Court in United States v. Coleman, 390 U.S. 599 (1968), as a complement to the prudent man test, on oil shale placer claims as of 1920. The Court was making an exception to the application of the General Mining Law based on both the history of the Mineral Leasing Act and the post-1920 treatment of oil shale claims by the Department of the Interior, rather than finding that section 37 required the application of pre-1920 standards. Andrus v. Shell Oil Co., supra at 673. The Court focused particularly on the Department's decision captioned Freeman v. Summers, 52 L.D. 201 (1927), wherein the Department had ruled that present marketability was not a prerequisite to patenting oil shale claims. 5/ This Board had overturned Freeman v. Summers, supra, on the basis of United States v. Coleman, supra. The Court reflected that Congress had recognized oil shale as valuable by preserving oil shale claims in section 37 even though oil shale was not a marketable commodity in 1920 and that therefore the imposition of a marketability test as of 1920 by the Board was inappropriate. The situation of oil shale claims was unique, and the Court expressly stated that this exception applies only to oil shale claims. Andrus v. Shell Oil Co., supra at n.11. We find no basis for construing the opinion

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5/ Freeman v. Summers, supra, did not discuss section 37. It focused entirely on the principles of discovery as applied to oil shale mining claims.

to limit the applicability of the General Mining Law to other placer claims preserved by section 37. 6/

[2] Having found that section 314 of FLPMA is applicable to appellant's oil placer claim, we now find that BLM properly declared the claim abandoned and void. Under section 314 of FLPMA the owner of an unpatented placer mining claim located before October 21, 1976, must file evidence of annual assessment work or notice intention to hold the claims in the proper BLM office on or before October 22, 1979, and prior to December 31 of each calendar year thereafter. This requirement is mandatory, and failure to comply conclusively constitutes abandonment of the claim by the owner and renders the claim void. Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981); James V. Brady, 51 IBLA 361 (1980).

[3] With respect to appellant's remaining arguments, we note that the conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself. As a matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In enacting section 314 of FLPMA Congress did not invest the Secretary of the Interior with authority to waive or excuse noncompliance with the statute, or to afford appellant any relief from the statutory consequences. Lynn Keith, supra.

6/ We note as well that part of the Court's discussion of section 37 claims detracts from appellant's argument. The Court discusses the viability of a 1956 statute which amended the mining laws to eliminate a requirement imposed on locators seeking patents for mining claims preserved by section 37. Andrus v. Shell Oil Co., supra at 671. Presumably if Congress was not restricted from changing the requirements applicable to such claims in 1956, it was also not restricted from doing so in 1976.

[4] Appellant's argument that the recordation requirements are unconstitutional may not be considered by this Board. The Department of the Interior as an agency of the executive branch of the Federal Government is not the proper forum to consider the constitutionality of the recordation provisions of FLPMA. Hugh A. Johnson, 54 IBLA 144 (1981); Lynn Keith, supra. However, we note that to the extent that Departmental regulations implementing FLPMA, which mirror the statute, have been considered by the courts, they have been upheld. Topaz Beryllium Co. v. United States, supra; Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981); Northwest Citizens for Wilderness Mining Co., Inc. v. Bureau of Land Management, Civ. No. 78-46M (D. Mont. June 19, 1979).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Wyoming State Office is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Gail M. Frazier
Administrative Judge